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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~744~~ 23

PATRICIA WALDRON, as executrix of the last will and
testament of GERALD B. WALDRON, Deceased,

Petitioner,

against

CITIES SERVICE CO.,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

Reply to Respondents Points I and III.

Respondent's brief is more significant for what it omits than for what it contains.

- (1) Respondent does not point to a single pleading or affidavit denying that respondent conspired with the other defendants to refuse to buy petitioner's oil. (Petition, Part I).

Although the petition fairly challenged it to do so, respondent does not even now represent that, if the case proceeds to answer and trial, respondent will deny that it conspired with other defendants. Respondent has avoided the conspiracy issue throughout ten years of litigation by refraining from serving any answer and by failing to submit any affidavit by an officer or employee speaking with personal knowledge of the facts. Instead, respondent has

trained its guns on two or three collateral issues in the pretense that petitioner's case stands or falls with those issues. In fact those issues, Kuwait, Consortium and Richfield (we shall show that "turnabout" as expounded by respondent's counsel was never an issue) can have no bearing on the outcome of the instant petition, for petitioner makes his case without any reliance on Kuwait, Consortium or Richfield. See Petition, Point III. The Kuwait and Consortium allegations need not have been pleaded in the first place, being only items of evidence. When the complaint was amended, they were omitted. (Plaintiff-Appellant's Appendix, pp. 73a-82a).

In the same vein respondent argues that it is entitled to summary judgment because of petitioner's "admissions" and "concessions" about times and events of the conspiracy. Behind respondent's barrage of words lies one thought: that petitioner must lose because he does not know the minutiae of the conspiracy (when it started, when it ended, who was to get what). Merely to state the proposition is to refute it. If plaintiffs in civil anti-trust actions were to be held to such standard of proof on the issue of conspiracy, they could never prevail and the legislative policy favoring the private policing of the antitrust laws would be frustrated. The law is otherwise. Far from imposing strict standards of proof of the element of intent to conspire in civil antitrust litigation, the law is liberal in accepting circumstantial evidence, in recognition of the fact that the proof of conspiracy is invariably in defendants' power. The authorities are cited and discussed in the petition (pp. 22-34). Certainly, in the instant case, petitioner's inability to answer all of the whys and wherefores of the conspiracy is insignificant when compared with respondent's failure to deny the conspiracy at all, let alone to produce someone with personal knowledge of the facts. That failure was not compensated for by respondent's submission of documents and affidavits (Brief In Opp. p. 5) which relate only to Kuwait and to respondent's participation in the events leading to the Consortium.

While Waldron did not know the inner workings of the conspiracy, he did know that respondent at first went along with him, as its self-interest dictated, and only changed its course after conferring with two other defendants, and that respondent thereupon not only cancelled its own deal with him, but also intervened to kill another deal he had going, after which respondent was again admonished by the other defendants to hew to their line. (Pet. pp. 4-7; 11; 22-23; Pltf's. App. 153a). These facts, without more, entitle petitioner, first, to defeat the motion for summary judgment, second, to engage in full discovery, and third, (but not determinative of this petition) to go to the jury on the issue of conspiracy even if no other evidence bearing on that issue is eventually discovered. But respondent would rather talk about Kuwait, Consortium and "turn-about".

Respondent endeavors to persuade the Court that petitioner has crossed the same street twice, thereby making two complete turnabouts. According to respondent, petitioner asserted, first, that respondent was interested in Iranian oil, then that respondent lost interest in Iranian oil, and, finally, that respondent never lost interest in Iranian oil. This misconstrues petitioner's position. Petitioner's contention is that respondent was interested in Iranian oil, that respondent gave up its chance to pursue that interest through the exploitation of petitioner's contract and contact with the Iranians, but that respondent never lost interest in Iranian oil. The only relevant issue is this: was respondent motivated by the conspiratorial purpose (to boycott the Iranian government and its contractors, among them Waldron, in order to enable defendants to move in) when respondent refused to deal with Waldron? Petitioner's answer is "yes", and he bases his answer on the circumstantial evidence discussed in the petition, not on Kuwait, Consortium or any loss of interest in Iranian oil on the part of respondent.

Although respondent does not come right out and say so, respondent seems to argue that it has obviated any need for denial of the conspiracy by furnishing what it considers

to be proof of a non-conspiratorial motive for its actions. (Brief In Opp. pp. 53-58). It may be that an antitrust defendant can, in a proper case, negate the conspiracy by convincing proof of a non-conspiratorial motive for its conduct, without denying the conspiracy in so many words, although its failure to do the latter will always be suspect. But if it wants to proceed in that manner, its proof, we respectfully submit, must be by affidavit by its officers or employees with knowledge, and supported by the entire record. Respondent has never furnished such affidavits and support. Such "proof" as there is in the record of a non-conspiratorial purpose for respondent's jilting of Waldron consists of counsel's testimony and of his argument on the basis of selected passages from selected documents from respondent's and the government's files (Br. In Opp. pp. 53-58). And who but respondent itself selected those documents! (Pet. p. 11). Petitioner draws an opposite inference from the same documents. (Pet. pp. 5, 6, 11). If respondent has accomplished anything by submitting those documents, it has created a case for the jury (to say nothing of a case for further documentary discovery).

(2) Respondent does not refute petitioner's contention that such limited discovery as petitioner has had was, in the first instance (Hill), ineffectual and, in the second instance (Watson, Frame and Heston), too restricted to allow petitioner to lay bare respondent's motivation for dealing with petitioner as it did. (Petition, Part II.)

Respondent flatly asserts, without supporting references, that petitioner has examined "every surviving Cities Service employee who had anything to do with him, Iran" or the collateral issues of Kuwait, Consortium or Richfield (Brief In Opp. p. 61). Respondent is silent as to Carter, who for twenty years had been an employee of respondent; who served respondent as a broker at the salient times; who attended the crucial conferences and accompanied respondent's party on the Iranian trip; but whom petitioner has not yet been allowed to examine. (Plaintiff-Appellant's

App. pp. 158a, 159a). Respondent is silent as to petitioner's claim that he should be allowed to examine the other defendants before his case against respondent is put to the test. (Pet. p. 21). Respondent fails to answer petitioner's contention that the unprecedented restrictive attitude taken by the trial judge is such a dangerous departure from the accepted and usual course of judicial proceedings in civil antitrust actions as to call for the exercise of this Court's power of supervision (Pet. pp. 12; 19-21). Respondent does not try to justify the standards applied by the judge when he "looked through the telescope at the other end" (Pet. p. 10) and inexplicably refused broad discovery to petitioner *because* petitioner needed broad discovery ("Because plaintiff's claim . . . is, judged by the entire available record so insubstantial, the plaintiff will not be given carte blanche authority to conduct untrammelled pretrial proceedings . . . the usual federal rule permitting fishing expeditions will be curtailed" (Pet. p. 49)). Respondent would rather talk about Kuwait, Consortium, "turnabout" and Richfield (Brief In Opp. pp. 63-64), issues that are not before this Court.

- (3) Respondent does not take issue with a single one of the facts (except Sandberg) on which petitioner relies as circumstantial evidence which entitles petitioner to a trial of the issues of conspiracy under decisions of this Court and lower federal courts. (Pet. Part III.)**

As for Sandberg, we would point out to the Court (1) that respondent's own Chief Executive Officer, Watson, admitted that Sandberg was a member of the Finance Committee of Royal Dutch Shell (Deft.-Resp.'s App. p. 425a); (2) that Watson never retracted his statement, neither during his deposition nor by affidavit on respondent's motion; and (3) that the asserted exchange between Beshar and Watson is denied by petitioner's counsel as earnestly as it is asserted by respondent's counsel (Brief In Opp. pp. 44-45). At most, then, respondent has raised an issue for the trier of the facts as to Sandberg's function.

II.

Reply to Respondent's Point II.

There is left for consideration only respondent's contentions that the lower courts did not impose the burden of proof on petitioner instead of respondent, as petitioner says they did, and that, in any event, petitioner did not argue that respondent had the burden. (Brief In Opp. pp. 5-7, 59-61). Those contentions are refuted both by what the courts did and by what they said.

Judge Herlands could not have been more explicit on the question of the burden of proof when, in 1961, he said:

"For the guidance of counsel, the court observes, on the basis of the present record:

1. It is doubtful in the extreme *whether plaintiff has shown that there is a genuine issue as to any material fact with respect to his claim against the defendant Cities Service Co.****" Opinion dated March 30, 1961; Petitioner's App. p. 70a, 71a. (Emphasis supplied.)

That the judge did not change his approach is clear from his final opinion:

"The single issue before the court relating to Cities' motion for summary judgment is whether plaintiff's discovery has unearthed a 'genuine issue [of fact] for trial' where nothing had existed before, but 'suspicion' and 'gossamer inferences drawn from the mere sequence of events.' " Opinion dated September 8, 1965; Pet. p. 44. (Emphasis supplied).

The judge's two pronouncements leave no doubt that he thought plaintiff had the burden of demonstrating the existence of fact issues. His ruling in that respect conflicts squarely with the authorities cited by petitioner in Point I of his Petition (at pp. 13-19). The Court of Appeals repeated the error:

"Despite these more than ample opportunities to develop a basis for his action, plaintiff has been

unable to do so, and has failed to demonstrate the existence of any genuine issue of fact." Pet. p. 39. (Emphasis supplied).

The lower courts' treatment of the motion shows that they practiced what they preached. Nowhere in Judge Herland's opinion did he consider the weight of the evidence produced by defendant, as he was required to do before turning to petitioner's case. From one end to the other, his opinion was a dissection of petitioner's case. Most importantly, the judge made no mention of the absence of any denial by respondent of the conspiracy, an omission which, in and of itself, is enough to defeat the motion. (Cf. *Interstate Circuit, Inc. v. United States*, 306 U. S. 208 (1939); *William Goldman's Theatres v. Loew's, Inc.*, 150 F. 2d 738 (3rd Cir. 1945), cert. den. 334 U. S. 811 (1948); other cases are cited in the Petition, at pp. 13-14). The Circuit Court adopted Judge Herland's reasoning (Pet. pp. 37-39).

Respondent is mistaken when it says petitioner did not take the position below that respondent had the burden of demonstrating the absence of any genuine fact issue (Brief In Opp. pp. 59-61). In petitioner's very first brief in opposition to respondent's summary judgment motion, submitted on May 6, 1960, petitioner argued that respondent had not sustained the burden of negating the conspiracy. Point II of that brief was entitled:

"The Motion Is Defective".

And the first subheading was entitled:

"(a) The documentary evidence [submitted by respondent] does not negate plaintiff's claim that Cities was bought off by Gulf and Anglo-Iranian."

In that very brief (at p. 37), petitioner relied on *United States v. General Railway Signal Co.*, 110 F. Supp. 422 (W. D. N. Y. 1952), cited in the petition (at p. 14), among others, in support of his contention that the case was not

a proper one for summary judgment. In that case, the court held:

"Movant has the burden of demonstrating clearly that there is no genuine issue of a material fact to be determined. *Hoffman v. Partridge*, 84 U. S. App. D. C. 224, 172 F. 2d 275." 110 F. Supp. at 425.

Petitioner preserved his position throughout. In his memorandum in opposition to respondent's application for summary judgment, filed on August 16, 1963, after reviewing the facts over 41 pages, petitioner put the issue (at pp. 41-42) as follows:

"Can one really say with any conviction that Cities Service has demonstrated the absence of any dispute as to the material issue of whether Cities Service conspired to boycott plaintiff?"

In his brief in the Court of Appeals (Point I, pp. 40-42), petitioner cited and discussed *Pollex v. Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962), where this Court discussed the standards to be applied on a Rule 56 motion. This Court held that the record must be viewed in the light most favorable to the party opposing the motion (368 U. S. at 473) and reversed a summary judgment for defendant on the very ground urged by petitioner herein: that defendant's affidavits failed to negative the conspiracy. (See, for example, 368 U. S. at 470). Later in the same brief (Point II, pp. 43-46), petitioner discussed and distinguished *Scolnick v. Lefkowitz*, 329 F. 2d 716 (2d Cir. 1964), in which the court imposed on defendants the very burden which, petitioner contends, should have been imposed upon respondent here as a *sine qua non* for the granting of the motion: the submission of detailed factual affidavits denying the conspiracy. In *Scolnick*, the defendants did sustain that burden, and, as plaintiff was unable to present countervailing evidence, the court granted defendants' motion for summary judgment, saying:

"Defendants' detailed affidavits, categorically denying the existence of such a conspiracy—and, in the

case of defendant Lefkowitz, denying knowledge of the plaintiffs' very existence—were sufficient to require the plaintiffs to 'set forth specific facts showing that there is a genuine issue for trial' under the recent amendments to Rule 56(e); this they failed to do." 329 F. 2d at 717.

In the instant case, just the opposite situation was presented. Respondent did not deny the conspiracy and, therefore, the burden was never shifted to petitioner (Pet. Point I). Moreover, petitioner did set forth specific facts by the way of circumstantial evidence to show that there is a genuine fact issue as to respondent's participation in the conspiracy. Hence petitioner would have sustained the burden if it had been shifted to him (Pet. Point III).

Conclusion.

The Petition should be granted.

Respectfully submitted,

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